

While the Defendant contends that these supporting declarations adequately support and provide a sufficient supplemental factual explanation of the ATF's position that its denial of Plaintiffs' Touhy Request is not arbitrary, capricious and an abuse of discretion, and/or is otherwise in accordance with the law, it will be prepared to have these individuals available to testify at the hearing in support of its assertions that the Touhy Request denial is appropriate at

this time.

However, due to the asserted law enforcement privilege, the ATF would respectfully ask the Court to consider, if necessary, that any further testimony by these law enforcement investigators, be exclusively on an *ex-parte in camera* review basis, without the presence of opposing counsel. The basis of this request is premised upon Defendant's position that their testimony is protected by the law enforcement privilege, i.e., that any testimony by these individuals would interfere with ongoing law enforcement proceedings or disclose investigatory techniques and procedures, the effectiveness of which would thereby be impaired. *See*, 28 C.F.R. §16.26; *Kerr v. U.S. Dist. Court for the Northern Dist. of California*, 426 U.S. 394, 405-6 (1976) ("... This Court has long held the view that in camera review is a highly appropriate and useful means of dealing with claims of governmental privilege." (citations omitted)); *Application of Eisenberg*, 654 F.2d 1107, 1113 (5th Cir. 1981). "In these formal privilege cases, the court examines the evidence in camera and balances the individual's interests in the information against the government's need to preclude disclosure." (citation omitted).

Here, because the government is not a party to the underlying state court lawsuit, the standard of review is not a balancing of interests, but rather is the relatively low threshold standard of whether in this APA Touhy litigation the ATF's determination not to produce requested information at this time because of its asserted law enforcement privilege is not arbitrary, capricious or an abuse of discretion, otherwise contrary to law. *See, Commonwealth of Puerto Rico v. United States*, 490 F.3d 50, 60-65 (1st Cir. 2007)(Citing, *inter alia*, the Fifth Circuit's discussion of the law enforcement privilege (in the context where the government was a party to the underlying litigation), *In re U.S. Dept. of Homeland Security*, 459 F.3d 565, 569-68 (5th Cir. 2006)). Even if the Court were to make this determination that ATF's decision was

somehow incorrect, the sole remedy available would be to remand the Touhy determination back to the agency for further consideration consistent with this Court's orders. *BizCapital Business & Indus. Development Corp. v. United States*, 467 F.3d 871 (5th Cir. 2006).

The undersigned has conferred with counsel for the Plaintiffs', Noelle Reed on July 16, 2015, and counsel has indicated that this motion is opposed.

DATED: July 20, 2015

Respectfully submitted,

RICHARD L. DURBIN, JR.
United States Attorney

By: /s/ John F. Paniszczy
JOHN F. PANISZCZYN
Assistant United States Attorney
State Bar No. 15443855
U.S. Attorney's Office
601 N.W Loop 410, Suite 600
San Antonio, Texas 78216-5597
Tel: (210) 384-7325
Fax: (210) 384-7312
John.Paniszczy@usdoj.gov

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify on the 20th day of July, 2015, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Noelle M. Reed
Skadden, Arps, Slate, Meagher & Flom LLP
1000 Louisiana Street, Ste 6800
Houston, TX 77002-5026

Carlos A. Balido
Walters Balido & Crain
10440 North Central Expressway
Dallas, TX 75231

John O'Herren
Sheehy Lovelace & Mayfield, PC
510 N. Valley Mills Drive, Ste 500
Waco, TX 76710

/s/ John F. Paniszczyn
JOHN F. PANISZCZYN
Assistant United States Attorney